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OPPORTUNITIES TO PROTECT INSTREAM FLOWS IN MAINE

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This is one of the first reports to be published in the new "Biological Report" series. This technical report series, published by the Research and Development branch of the U.S. Fish and Wildlife Service, replaces the "FWS/OBS" series published from 1976 to September 1984. The Biological Report series is designed for the rapid publication of reports with an application orientation, and it continues the focus of the FWS/OBS series on resource management issues and fish and wildlife needs.

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OPPORTUNITIES TO PROTECT INSTREAM FLOWS IN MAINE

by

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FOREWORD

The Western Energy and Land Use Team, Division of Biological Services, U.S. Fish and Wildlife Service, has published this series of "opportunity" documents since 1978. Information on instream flow protection is now available for 30 Western, Midwestern, and Southern States (Table 1).

In some reports, opportunities in each State are presented in a single document, but in several publications, reports on States from the same geographical region are combined. The complete list of reports in this series is displayed in Table 1. The combination of State reports presents an opportunity for easy comparison of specific programs. This is particularly useful because of the wide variety of instream flow protection programs or possibilities.

The primary purpose of this series of documents is to indicate current opportunities in instream flow management so that planners and managers can anticipate development, plan appropriate programs, and evaluate the costs and benefits of certain courses of action. In addition, the reports are brief histories of the level of success of various State programs. The use of this information can result in a significant cost saving for planners and managers.

Each report contains an Introduction which discusses its purpose, uses, and limitations, and separate information tables which summarize the contents for each State. It is hoped that the research represented in these documents will provide the kind of overview and preliminary evaluation that will ease the burden of State, local, or Federal planners and managers as they seek to meet their increasingly complex responsibilities.

Table 1. Publications in the opportunity series.

Title	Publication number	Status[1]
Instream Flow Strategies for Arizona	FWS/OBS-78/35	Available
Instream Flow Strategies for California	FWS/OBS-78/36	Available
Instream Flow Strategies for Colorado	FWS/OBS-78/37	Out-of-print
Instream Flow Strategies for Idaho	FWS/OBS-78/38	Out-of-print
Instream Flow Strategies for Montana	FWS/OBS-78/39	Available
Instream Flow Strategies for Nevada	FWS/OBS-78/40	Available
Instream Flow Strategies for New Mexico	FWS/OBS-78/41	Available
Instream Flow Strategies for North Dakota	FWS/OBS-78/42	Available
Instream Flow Strategies for Oregon	FWS/OBS-78/43	Out-of-print
Instream Flow Strategies for South Dakota	FWS/OBS-78/44	Available
Instream Flow Strategies for Utah	FWS/OBS-78/45	Available
Instream Flow Strategies for Washington	FWS/OBS-78/46	Out-of-print
Instream Flow Strategies for Wyoming	FWS/OBS-78/47	Out-of-print
Opportunities to Protect Instream Flows in Alaska	FWS/OBS-82/33	Available
Opportunities to Protect Instream Flows in Nebraska and Kansas	FWS/OBS-83/02	Available
Opportunities to Protect Instream Flows in Minnesota and Iowa	FWS/OBS-83/07	Available
Opportunities to Protect Instream Flows in Georgia	FWS/OBS-83/20	Available
Opportunities to Protect Instream Flows in Michigan and Wisconsin	FWS/OBS-83/21	Available
Opportunities to Protect Instream Flows in Texas, Oklahoma, and Arkansas	FWS/OBS-83/22	Available
Opportunities to Protect Instream Flows in Maine	BS 85/10	Available
Opportunities to Protect Instream Flows in Idaho, Oregon, and Washington	BS 85/11	Available
Opportunities to Protect Instream Flows in Missouri	IFG Working Paper 308.16	
Hawaiian Water Rights and Instream Flows	IFG Working Paper 308.3	

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[1] Available from the Western Energy and Land Use Team, U.S. Fish and Wildlife Service, 2627 Redwing Road, Fort Collins, CO.

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INTRODUCTION

Opportunities to Protect Instream Flows in Maine provides the reader with a basic survey of State prerogatives and programs that may be used to protect the instream uses of water. Because of the interest and responsibilities of State fish and game agencies and other conservation organizations, most of these opportunities are related to fish and wildlife. However, many other instream uses are considered, including hydroelectric power production, recreation, navigation, downstream delivery, and waste load assimilation. The purpose of this document is to illustrate methods to protect these instream values within the context of existing rules and regulations. Attention is given only to State programs.

The author has paid close attention to statutes, however, this document is not intended as a legal reference. It is designed to be a planning tool to survey current State programs, compare approaches to instream use protection, and give a preliminary evaluation of the costs and benefits of a wide range of programs. A summary table serves as an index to available opportunities. We anticipate that this table will be the reader's most valuable guide to this report.

In using this report, the reader should be aware of its purpose and limitations. First, only a few of many possible opportunities are described herein. Initiative, judgment, and creativity should be used in dealing with any specific situation. Second, this report should only be a starting point. In any situation related to the acquisition of water rights, legal advice should be sought. This report should in no way be construed as a substitute for the opinion of a private attorney, attorney general, or agency counsel. Third, this report is neither a policy nor a decision document; it is simply a collection of opportunities which appear to have utility in a variety of situations.

A purpose of this report is to encourage cooperative and innovative thinking by all persons interested in instream flows for fish and wildlife, and watershed management at Federal, State, or local levels of government, as well as private individuals and wildlife organizations. Many talented people want to protect instream flows; their cooperation in a variety of approaches will be necessary to further this goal.

Maine is well known for its wealth of rivers and streams. These waterways have always played an important part in the State's economy and provided recreational values. Because of Maine's apparently abundant water resources and relatively small population, maintaining proper levels of streamflow for the purpose of preserving instream values (i.e., fishing, boating, wildlife habitat, etc.) is not currently perceived as a great problem. However, with a growing population, as well as increasing hydropower development, dam construction and forest and timber harvesting practices, the potential for instream flow problems exists. Maine, as discussed in this report, has a wealth of potential mechanisms which may be implemented both by the private and the public sector to protect instream flows and values.

This report follows a format which describes the opportunity (including legal basis), provides detailed background information, and then gives an evaluation of the opportunity. This evaluation notes whether or not the opportunity is frequently used and explains costs or obstacles involved in implementation. Often, when an opportunity is frequently used an example is also given. All of this analysis is summarized in Table 2.

The purpose of Table 2 is to serve as an index to the many opportunities. The reader may wish to read the whole monograph, but, short of that, Table 2 allows the reader to skim through the various opportunities, reading more about those of particular interest.

Table 2. Opportunities for protecting instream flows in Maine.

Title	Identification	
	General description	Applicable situations
The Maine Rivers policy (See page 6)	Evaluating and classifying rivers and river segments to balance competing uses to control unreasonable dam development (12 M.R.S.A. § 401-406).	Primarily on rivers classified as "outstanding" by virtue of their unparalled natural and recreational values.
The Riparian doctrine (See page 8)	Guaranteeing water rights to landowners riparian to a water course as long as use is reasonable (Davis v. Getchell [50 ME. 602 (1862)].	Any situation where land abutting a stream is privately owned.
Permits for alteration of rivers, streams, and brooks (See page 17)	Conditioning permits to alter water courses with a requirement for instream flows (12 M.R.S.A. § 776 et. seq.).	Any river, stream, or brook where dredging occurs.
Draining of meadows, swamps, and marshes (See page 18)	Removing obstructions in rivers and streams leading from meadows, swamps, beaches or other low land (12 M.R.S.A. § 3251 et. seq.).	Rivers and streams leading from meadows, swamps, beaches, or other low land which is held by several proprietors.
Critical Areas Register (See page 19)	Conserving portions of rivers and streams which are within the Register of Critical Areas (12 M.R.S.A. § 3310 et. seq.).	Sites of "unusual natural, scenic, or scientific significance".
Hydropower development permits (See page 14)	Conditioning permits for hydropower projects to preserve specific instream values (38 M.R.S.A. §§ 630-636).	Any hydropower projects.

Table 2. (continued).

Title	Identification	
	General description	Applicable situations
Conservation of Atlantic sea run salmon (See page 15)	Purchasing or leasing land, dams, and other structures to acquire flowage rights in the interest of conserving Atlantic salmon (12 M.R.S.A. § 6251 _et_. _seq_.).	All rivers with fishable populations of Atlantic salmon.
Permit for alteration of coastal wetlands (See page 16)	Conditioning permits for alteration of coastal wetlands dependent on conservation of instream values.	Coastal rivers which are subject to tidal influence.
Mandatory shoreland zoning (See page 10)	Zoning shoreland areas under the Mandatory Zoning and Subdivision Control Act to protect instream values, e.g., prohibit activities which would interfere with instream values (12 M.R.S.A. § 4811).	Shoreland by municipalities "within 250 feet of the normal high water mark of any pond, river, or salt water body."
Protection and management districts (See page 11)	Obtaining permits with conditions for protecting instream values to regulate development activities on land by certain rivers (12 M.R.S.A. § 681 _et_ _seq_.).	On and around rivers endangered by development.
Site location of development (See page 12)	Conditioning permits for large development proposals upon protection of instream values (38 M.R.S.A. § 481 _et_. _seq_.).	Any proposed development which occupies more than 20 acres or affects an area greater than 60,000 sq. ft.
Creation of fishways (See page 21)	Creating fishways in existing dams within coastal and inland water for anadromous and migratory fish, respectively (12 M.R.S.A. §§ 6121 and 12 M.R.S.A. §§ 7701-A, respectively).	Any dams or artificial obstructions in coastal and inland waters.

Table 2. (concluded).

Title	Identification	
	General description	Applicable situations
Protection of endangered species (See page 23)	Acquiring land or aquatic habitats or requiring adequate instream flows to protect endangered species (12 M.R.S.A. § 7751 et. seq.).	Any endangered species habitat.
Protection planning (See page 24)	Landowners and agencies may grant land or gain easements for protection of land and water (12 M.R.S.A. § 685-A.4).	Landowners' option.
Formation of soil and water conservation districts (See page 26)	Such a district can protect stream flows through conservation and management (12 M.R.S.A. § 2 et. seq.).	Where landowners need management control of resource.
Condemnation by water companies (See page 27)	A water company could condemn water for delivery to its point of use (12 M.R.S.A. § 3241).	Where water companies need to protect supplies
Municipal acquisition (See page 28)	Cities may buy land to preserve their supply and then enforce use regulations on the land (12 M.R.S.A. § 3753 et. seq.).	Where cities need to protect supplies.

THE MAINE RIVERS POLICY

One of the greatest threats to Maine's rivers and streams is excessive hydropower development. In 1982, in recognition of this threat, the Maine Department of Conservation and the National Park Service, in cooperation with numerous State and Federal agencies and user groups, conducted a study of Maine's rivers and streams. The major goal of the study was to identify unique natural and recreational rivers by first identifying and documenting important rivers and related resource values and then ranking the State's rivers into categories of significance based on composite river resource value. The result of the study was a river classification based on a comparative river evaluation. Maine rivers or river segments were classified as "A", "B", "C", or "D" rivers.

In June, 1983, Maine enacted the Maine Rivers Policy to promote the "... wise use and management of Maine's outstanding rivers resources." Based upon the 1982 Maine Rivers Study, the Maine Rivers Policy (12 M.R.S.A. § 401-406) "seeks to strike a balance among the competing uses of the State's outstanding rivers and streams from unreasonable dam development." Most rivers classified as "A" rivers under the Maine Rivers Study, are declared to be "outstanding" by virtue of their unparalleled natural and recreational values under the Maine Rivers Policy (portions of the West Branch Penobscot and St. John Rivers, classified as "A" river portions, were deleted from and several "B" river portions were added to the final list of "outstanding" rivers).

The outstanding rivers and river segments are protected under the Maine Rivers Policy from any further hydropower development utilizing dams without specific authorization from the Maine Legislature. Moreover, existing dams may not be expanded or developed if such actions would diminish the significant resource value of the river segment, as determined by the Maine Rivers Study. Unfortunately, a hydropower project designed to withdraw water from an "outstanding" river segment without the use of a dam would not require legislative approval. Such a project would simply be reviewed on its merits under the Maine Waterway Development and Conservation Act. (See the section on Hydropower Development Permits discussed later in this study.) This act is subject to legislative review every five years, at which time it must be reenacted by the Legislature. Inasmuch as the Legislature has recognized the value of Maine's significant river resources through this act, it is probable that this act will effectively protect those rivers and river segments recognized as outstanding. (See Section 12 M.R.S.A. § 403 for rivers and river segments recognized as "outstanding".)

With regard to use of the water in rivers and streams, Maine employs the riparian doctrine of water allocation. This doctrine stipulates that only landowners whose land abuts a stream or other water source have the inherent right to use water (although water rights may be sold to persons not owning land abutting the stream). The riparian water right allows the landowner to use water only on the riparian land.[1] Because this is essentially a doctrine of private rights, public access and regulations must take an indirect form.

As in other riparian doctrine States, water use is regulated through water quality processes, land use statutes and ordinances, soil conservation practices, and general environmental laws. In addition, municipalities, special districts and other public entities have authorities which allow management practices to protect instream values.

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Parkin, D. Personal communication. U.S. Department of Interior, National Park Service. Letter to Berton L. Lamb. 19 June 1984.

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[1] Riparian land is a term used throughout this report to mean land which is held in a single title and is contiguous to a stream.

THE RIPARIAN DOCTRINE

OPPORTUNITY

Any entity (e.g., city, agency, etc.) or individual who holds a riparian water right may demand that water in sufficient quantity be delivered downstream for their use and, thereby, protect instream values.

BACKGROUND

In Maine, riparian water rights attach by virtue of ownership of land adjacent to a watercourse. In order to be a riparian landowner the deed granting the estate must include ownership of the streambed. An estate which includes only the banks of a stream is considered nonriparian. The riparian right, in Maine, is characterized as the right to make "reasonable use" of water in the stream. Therefore, the riparian property owner does not own the water itself, but has the right to use the water as it flows by his property. The riparian right to use water has been aptly described by the Maine Supreme Court in Davis v. Getchell [50 Me. 602 (1862)], where the Court stated:

> Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his land, without diminution or alteration. No proprietor has the right to use water to the prejudice of the proprietors above or below him, unless he has a prior right to divert, or a title to some exclusive enjoyment ... Thus he may [make reasonable use of it] but not to such an extent as unreasonably to diminish its quantity....

On the other hand, nonriparian users of water (i.e., landowners not abutting a stream, abutting a stream but having no ownership right in the streambed, or having upland and bottomland interests but having granted or sold the water rights away by separate deed) must conform to the natural flow theory of water use. Under this theory the natural flow of the stream, free from any substantial diminution in quantity or quality, is guaranteed to the downstream landowners.

Any disputes regarding water rights are settled in the Maine Courts. The courts must determine what are, in fact, reasonable uses by riparian proprietors by taking into account the facts and circumstances surrounding the individual stream, including its size, character, and general nature.

In summary, "[w]ithin the framework of the reasonable use rules, it appears that a riparian landowner is allowed to use water for virtually any purpose so long as the method of use is reasonable. Some of the purposes recognized by the Maine(sic) Court include domestic, irrigation, industrial, and manufacturing uses" (Dewsnup and Jensen 1973:368).

EVALUATION

Every riparian owner has an equal right to put the flow of a river to reasonable use. The drawback to asserting a riparian right and requiring that there be enough water to allow a reasonable use is not only the fact that one must institute a lawsuit in the courts and bear the resulting monetary costs, but also that one has a substantial burden of proof to overcome in order to be successful in such a lawsuit. In order to bring suit a riparian owner must show first that his use is reasonable and second either that another use is unreasonable (no actual injury need be shown) or that an otherwise reasonable use has substantially impaired the suing riparian owner's ability to make a reasonable use of the streamflow. Moreover, nonriparian users may make use of the water to the extent that they do not significantly diminish the quantity or quality of the water. Should a nonriparian user violate this rule, any downstream owner may bring action in the Maine courts to enjoin or limit the use of the water in the stream by the nonriparian. It is also possible for a landowner to contact the Maine Department of Environmental Protection (DEP). The DEP has been working on water quantity regulations and thus if a landowner's streamflow is diminished below acceptable regulatory standards, he or she could avoid litigation and seek help from the DEP.

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Dewsnup, R., and D. Jensen. 1973. A summary-digest of State water laws. U.S. National Water Commission. 826 pp.

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LAND USE AND ZONING LAWS

MANDATORY SHORELAND ZONING

Opportunity

Municipalities could, under the Mandatory Zoning and Subdivision Control Act (MZSCA), zone shoreland areas within their boundaries in such a manner as to protect instream values, i.e., prohibit activities which would interfere with instream values (12 M.R.S.A. § 4811). Moreover, the State, in overseeing the MZSCA, could publicize and promote the potential within the Act for protecting instream flows, particularly when giving municipalities guideline literature and technical assistance.

Background

Under MZSCA, municipalities are mandated to zone shoreland areas in such a manner as to protect and enhance water quality, to protect the shoreland areas from erosion, to protect and preserve fish and wildlife habitats and to protect and conserve the aesthetic quality of these areas (12 M.R.S.A. § 4811). Shoreland areas are, by definition, "land[s] within 250 feet of the normal high water mark of any pond, river or salt water body ..." (12 M.R.S.A. § 4811). The Shoreland Zoning Ordinances may limit uses of the land, create minimum lot sizes and set back requirements, and limit the amount of tree clearing and cutting near the shoreline. Should any municipality fail to adopt the required zoning or adopt zoning which does not fulfill the Act's goals and purposes, the Land Use Regulation Commission and Board of Environmental Protection will create ordinances which the municipalities in question must adopt and administer (12 M.R.S.A. § 4813).

Evaluation

Under this statute, municipalities are required to zone areas within their municipal boundaries that are within 250 feet of ponds, rivers, and streams. Because the statute requires protection of water quality, vegetation, wildlife, and aesthetic quality, activities on these lands must cause minimal disturbance. Such minimal disturbance activities are usually consistent with the maintenance of instream values. The primary concerns of this statute are soil erosion and maintenance of water quality. Municipalities could prohibit any activities on these lands, even "minimal disturbance activities", which would interfere with or diminish instream values inasmuch as such activities will most likely run counter to the statute's purposes.

PROTECTION AND MANAGEMENT DISTRICTS

Opportunity

The Land Use Regulation Commission (LURC) could create "natural character" management subdistricts or protection districts on and around rivers endangered by development. The LURC could then issue permits for activities upon such land, with the condition that instream values will not be affected (12 M.R.S.A. § 681 *et seq.*).

Background

The LURC is required by Maine statutes to zone all unorganized townships, plantations, and coastal islands into either "protection," "management," or "development" districts. Each type of district is further divided into subdistricts, many of which can directly protect instream values.

Management districts. The LURC can create a "natural character management subdistrict" in order to "maintain ... areas that characterize the natural outdoor flavor and spirit of certain large undeveloped areas." Only forestry, agricultural activities, and primitive recreation (e.g., fishing, hiking, hunting, wildlife study and photography, etc.) are allowed without a permit. Other specified uses in these subdistricts require issuance of a permit by the LURC. One criterion which the LURC must consider in order to approve a permit is that "adequate provision has been made for fitting the proposal harmoniously into the existing natural environment in order to assure there will be no undue adverse effect on existing uses, scenic character and natural and historic resources in the area likely to be affected ..." (12 M.R.S.A. § 685-B.4) However, the LURC's own regulations stipulate that, in order to be classified as a natural character management subdistricts, areas must: 1) be appropriate for forest management activities; 2) have the requisite natural character (as stated in section 10.15, C.2b. of LURC's Land Use Districts and Standards); 3) comprise at least 10,000 contiguous acres of land and water area; and 4) support only activities not appreciably detracting from the natural character of the area. Thus, the opportunity for creating a natural character management subdistrict and protecting instream flows is limited because many areas don't meet the requirements.

Protection districts. Protection subdistricts protect areas where certain types of development could have damaging results. Examples of protection subdistricts which are used to protect instream values are fish and wildlife subdistricts, recreation subdistricts, shoreland subdistricts, and wetland subdistricts. In all these subdistricts certain activities, e.g., primitive recreation (as defined above), are allowed without permit; other activities require a permit or are prohibited. As noted above, in order for a permit to be issued the LURC must be assured that there is an adequate provision for harmonious coexistence between the proposed activity and the existing natural environment. Thus, the LURC apparently has the option to judge any interference with instream values as not harmonious.

Example

Currently, the LURC is in the process of zoning those rivers and river segments within its jurisdiction identified as "outstanding" by the Maine River Study (discussed under a previous section entitled Maine Rivers Policy) into protection districts; to date, 700 miles of rivers have been zoned in this way. The protection district creates a 250 foot deep strip on either side of the river in which no further hydro development (unless specifically allowed by an Act of the Maine legislature), additional commercial, industrial, nor residential development is allowed. The purpose of these districts is to maintain the current natural resource value of these rivers and river segments.

Evaluation

About one-half of Maine is zoned by the LURC into these types of districts and subdistricts, thus many activities are regulated by and require permits from the LURC. The LURC needs only to determine that interference with instream values has an undue adverse effect on the river or stream, and then assign conditional restrictions to permits that will allow only minimal interference with instream values. The aim of these districts is to avoid undue adverse effects. The possibility exists for the LURC to amend its current regulations to clearly state that maintenance of instream values will be taken into account prior to granting any permit.

SITE LOCATION OF DEVELOPMENT

Opportunity

The Board of Environmental Protection (BEP) can make the issuance of permits for large development proposals conditional upon protection of instream values (38 M.R.S.A. § 481 *et seq*.).

Background

Because of their size and nature, many developments can cause damage to the environment. Under current Maine law any proposed development which occupies more than twenty acres or affects an area greater than 60,000 square feet must obtain a permit from the BEP prior to construction and operation. Currently, the Department of Environmental Protection interprets this law as applicable to any project that either: a) floods three or more acres of new land; or b) permanently affects a water surface area of more than 20 acres by raising or lowering the water level. As a result of this interpretation, most *non*-hydro dam projects would be subject to review by the BEP under this law. The BEP may either condition the issuance of a permit to promote the objectives of this law (i.e., insuring that these developments have minimal adverse impact on the natural environment) or disapprove the proposed development.

Factors which the Board must consider when making its decision are: 1) financial capacity; 2) traffic movement; 3) *no adverse effect on the natural environment*; and 4) soil types. Under 3), a developer must show that the development will fit harmoniously into the existing natural environment and that the development will not adversely affect "existing uses, scenic character or natural resources" in the area. Under this law, "natural environment" is defined to include the character, quality, and uses of water in the area.

Evaluation

This law mandates protection of existing uses; the foremost concern is to prevent soil erosion often caused by land development and construction. Soil erosion and resultant sedimentation in turn affect water quality. A decrease in water quality can affect fish and wildlife habitat as well as other instream values. The law, although self-limited to large projects, could be amended to explicitly state that maintenance of instream values (not just "existing uses") is required. An advantage of this statute is that every large development proposal must receive a permit prior to implementation.

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HYDROPOWER AND STREAM ALTERATION LAWS

HYDROPOWER DEVELOPMENT PERMITS

Opportunity

Prior to construction of any hydropower project, the Department of Environmental Protection (DEP) or the Land Use Regulation Commission (LURC) must issue a permit. These permits could be conditioned to require maintenance of water flow to preserve specific instream values. (38 M.R.S.A. §§ 630-636)

Background

In June 1983, the Maine Legislature enacted the Maine Waterway Development and Conservation Act. Within this Act, the Maine Legislature specifically recognizes the value of its surface waters, as well as hydropower, as "the state's only economically feasible, large-scale energy resource ..." (38 M.R.S.A. § 631.1). The Act states that while hydropower projects may have "adverse effects", "they may also have positive environmental effects" (i.e., flood control, increased downstream water flow for the improvement of fish and wildlife habitats, water quality, recreational opportunities). Thus, the Maine Legislature declared hydropower development to be deserving of "singular treatment" (38 M.R.S.A. § 631.1).

A hydropower project is defined, under the statute, as "any development which utilizes the flow of water as a source of ... power or which regulates the flow of water for the purpose of generating ... power." (38 M.R.S.A. § 632.3). Under the statute, the permit-granting authority may approve projects upon terms and conditions which it feels "appropriate and reasonable to protect and preserve the environment and the public's health, safety, and general welfare ..." (38 M.R.S.A. § 635.1) These terms and conditions include: 1) establishing a water level for any water impounded; 2) establishing minimum flows for the affected waters; and 3) provisions for fish passage. Additionally, an applicant for a permit is required to show, among other things: 1) that he has made "reasonable provisions to realize the environmental benefits of the project ... and to mitigate its adverse environmental impacts"; and 2) that "the advantages of the project (creation of power) are greater than the direct and cumulative adverse impacts," (i.e., harm to soil stability, shorelands, fish and wildlife habitat, historic or archeological resources, public rights of access to and use of surface waters, etc.). (38 M.R.S.A. § 636.7)

Notably, this new statute exempts hydropower projects from review under other environmental statutes (i.e., the Site Law, Coastal Wetlands Law, Stream

Alteration Law); however, it does provide for specific consideration of adverse effects upon instream values prior to approval of a permit for a hydropower project. Therefore, the permit granting agency need not issue a permit in situations where instream values would be significantly affected by hydropower development.

Evaluation

This statute was created to both "streamline" the process of obtaining a hydropower project permit and protect Maine's rivers. It specifically considers the effect of hydropower projects on instream values. The burden of proving that a proposed hydropower project will not significantly affect instream values is on the individual seeking a permit, as are the resultant costs. Although specific consideration of instream values is mandated by this statute, thus providing a viable means of protecting instream values from the threat posed by excessive hydropower development, it must be remembered that the Act seeks a balance between protection of instream values and job or energy considerations. Regulations implementing this law are not available at this writing, but they should promote the protection of instream values.

CONSERVATION OF ATLANTIC SEA RUN SALMON

Opportunity

The Atlantic Sea Run Salmon Commission (ASRSC) may purchase or lease land, dams and other structures to acquire "flowage rights" in the interest of conserving Atlantic salmon, and thereby protect instream values. (12 M.R.S.A. § 6251 *et seq*.)

Background

In 1947, Maine formed the ASRSC in order to protect and enhance the rapidly decreasing Atlantic salmon populations in the State's streams and rivers. The program has been very successful in Maine: eight Maine rivers have fishable populations of Atlantic salmon, the Penobscot River has a re-established Atlantic salmon run, and the Union River has an established salmon population at its mouth. Under Maine law, the ASRSC may:

> ... purchase or lease within the State lands, dams and other structures to acquire flowage rights, mill privileges and rights-of-way and to build dams and other structures for the purpose of conservation of Atlantic salmon, provided prior rights of municipalities are not affected thereby (12 M.R.S.A. § 6252).

Evaluation

This statute specifically permits the ASRSC to protect streamflows, with the proviso that it be for the protection of Atlantic salmon. Pursuant to the statute, any action by the ASRSC requires expenditure of money. For example, the ASRSC has purchased land and water rights on the Dennys River from small private owners. After purchasing such rights, the ASRSC, depending on the particular situation, might entirely remove existing dams or perhaps improve or create fishways on the dams. In situations where a large hydroelectric power plant interferes with the conservation of Atlantic salmon, the ASRSC often enters into voluntary agreements with the power plant owner for the protection of adequate streamflows.

Another source of support for the salmon streamflows is at the grassroots level. Almost everyone in Maine wishes to protect salmon. Their immense popularity gives rise to the possibility of using the "political clout" of salmon interests to preserve instream flows in salmon waters.

SOURCES

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PERMIT FOR ALTERATION OF COASTAL WETLANDS

Opportunity

The Board of Environmental Protection (BEP) can make issuance of permits for alteration of coastal wetlands dependent on conservation of instream values (38 M.R.S.A. § 471 et seq.).

Background

The Coastal Wetlands Law provides that in order to alter a wetland, (i.e., dredge, fill, drain or construct on a coastal wetland) a permit must be issued by the BEP (38 M.R.S.A. § 471). This law applies to coastal rivers only (river portions which are subject to tidal influence) (38 M.R.S.A. § 472.2). In order to be granted a permit, an applicant must show that the proposed activity will not: 1) unreasonably interfere with existing recreational and navigational uses; 2) cause unreasonable soil erosion; 3) unreasonably interfere with the natural flow of any waters; 4) unreasonably harm wildlife or freshwater estuarine or marine fisheries; or 5) lower the quality of any waters (38 M.R.S.A. § 474).

Evaluation

The Coastal Wetlands Law mandates protection of instream values in coastal rivers by requiring developers to show that recreational and navigational uses, natural flow, and fisheries will not be unreasonably harmed. Although no instream flow problems have been identified in Maine that would bring this law into effect, the potential for protection exists should the need arise. The counterpart of this legislation that serves the same function on inland waters is the Stream Alteration Law (see below).

SOURCES

Parkin, D. Personal communication. U.S. Department of the Interior, National Park Service. Letter to Berton L. Lamb. 19 June 1984.

PERMITS FOR ALTERATION OF RIVERS, STREAMS AND BROOKS

Opportunity

The Department of Inland Fisheries and Wildlife (DIFW) has the authority to condition all permits to alter water courses with a requirement for maintenance of instream flows. (12 M.R.S.A. § 7776 *et seq*.)

Background

Any alteration of a river, stream or brook requires a permit from the DIFW (12 M.R.S.A. § 7776); an alteration is defined as dredging or causing to be dredged. Permits will be issued when the DIFW has determined that the proposed activity will not:

A. Unreasonably interfere with existing recreational and navigational uses;

B. Cause unreasonable soil erosion;

C. Unreasonably interfere with the natural flow of any waters;

D. Unreasonably harm any wildlife habitat; or

E. Lower the quality of any waters.

(12 M.R.S.A. § 7777.1)

Evaluation

Protection of instream flows are required by this statutory provision which prohibits unreasonable interference with natural flow. As a practical matter, permit requirements are usually met or can be met with modifications of the proposals or conditioned permits. The basic concerns of the DIFW are sedimentation and soil erosion. Each application for a permit under this statute is evaluated on its own particular circumstances. But generally, where a proposed activity might cause any river or streambank instability, permits include conditions requiring stablilization of such banks. Also, as a specific example, where an applicant proposes to widen a stream, the activity must not cause any low flow: adequate water flow must remain in the water course. Denial of a permit is considered a drastic measure, used only where modifications to the proposed alteration are not possible. River alteration permits provide a direct and efficient way for Maine to protect instream flows from detrimental alterations. Notably, the 1983 policy law discussed previously strengthens the stream alteration laws on "A" classified rivers.

SOURCES

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DRAINING OF MEADOWS, SWAMPS, MARSHES

Opportunity

Instream flows can be protected by common owners of one piece of land who petition the Court for removal of obstructions in rivers and streams leading from meadows, swamps, beaches or other low land. (12 M.R.S.A. § 3251 et seq.)

Background

Maine's statutes state that "[W]hen any meadow, swamp, marsh, beach or other low land is held by several proprietors and it becomes necessary or useful...to remove obstructions in rivers or streams leading therefrom, such improvements may be effected under the direction of Commissioners in the manner provided." (12 M.R.S.A. § 3251) Some of these proprietors apply by complaint to the Superior Court (12 M.R.S.A. § 3252), which determines whether the proposed improvement is generally advantageous for the proprietors. (12 M.R.S.A. § 3253) The Court, if its determination affirms the application, then appoints three Commissioners whose duties include prescribing the measure to be adopted to effectuate the improvement. (12 M.R.S.A. § 3253) Thus, proprietors of land may apply to the courts for removal of obstructions in rivers and streams (which lead from meadows, swamps, and other low lands) for the purpose of maintaining an adequate instream flow in such rivers and streams. The Court will decide if the removal of obstructions is to the benefit of all the land owners.

Evaluation

Although this section could afford some protection to instream flows, its application is limited. Not only is its application limited to rivers and streams emanating from meadows, swamps, marshes, beaches or low lands, but the lands must be owned by more than one person. Moreover, the Courts must then recognize protection of instream flows as a purpose of general advantage to the proprietors, and the proprietors must be willing to bear the monetary cost of their proposals.

CRITICAL AREAS REGISTER

Opportunity

Landowners along rivers can work with the State Planning Office to conserve portions of rivers and streams that are within the Register of Critical Areas. (12 M.R.S.A. § 3310 et seq.)

Background

In 1974, the Maine Legislature passed the "Act for a State Register of Critical Areas" (Act). The Act's purpose is to facilitate the preservation and optimum development of sites or areas, within Maine, of "unusual natural, scenic or scientific significance." Specifically, critical areas are "areas containing or potentially containing plant and animal life or geological features worthy of preservation in their natural condition, or other natural features of significant scenic, scientific or historical value." The Legislature determined in 1979 that the best way to accomplish the Act's goals was by way of the State's land use laws and through voluntary conservation efforts by landowners. Critical area designation of a natural feature (e.g., waterfall or whitewater rapid) does not protect the feature or restrict future land or resource use. The program attempts to inventory natural features, and the State Planning Office is authorized to work with interested landowners on voluntary conservation of these features. (5 M.R.S.A. § 3311, as amended)

Maine has completed critical area assessments for a number of physical and biological resources. Some, such as waterfalls and whitewater rapids, are directly applicable to stream conservation. Others, such as rare plant resources, are indirectly applicable because they are located in river corridors. Instream flow standards are essential to the preservation of these resources. Good inventories are available for waterfalls, whitewater rapids and rare plants. This is, however, only the first step, the second is designation as a "critical area". Thus, efforts should be made by landowners to facilitate the designation of inventoried features on their property as "critical areas".

Evaluation

The effectiveness of this Act depends entirely upon the voluntary efforts of landowners along rivers and has little value in a regulatory sense. The real value of the Critical Areas Program lies in its potential to educate landowners and improve general public awareness of Maine's natural features. If the landowner agrees to implement water conservation proposals for rivers and streams running across his property, instream values can effectively be protected. It should be noted that Maine has had success with it voluntary conservation programs. In 1980, out of 204 critical areas, only one was considered to be threatened despite designation. This Act, therefore, has a good chance of success for protecting instream values.

SOURCES

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FISHERIES MANAGEMENT LAWS

CREATION OF FISHWAYS

Opportunity

Maine law allows for the erection, maintenance, reparation or alteration of a fishway in existing dams within coastal and inland water for anadromous and migratory fish, respectively. Erection, maintenance, reparation or alteration of a fishway could be made mandatory upon a finding of unreasonable interference with anadromous or migratory fish waterways, thus protecting instream flows. (12 M.R.S.A. §§ 6121 and 12 M.R.S.A. §§ 7701-A, respectively)

Background

The Commissioners of the Department of Marine Resources and the Department of Inland Fisheries and Wildlife are authorized by statute to require fishways in dams or other artificial obstructions in coastal and inland waters. (12 M.R.S.A. §§ 6121 and 12 M.R.S.A. §§ 7701-A, respectively) The Commissioners of these two departments must periodically inspect all dams or artificial obstructions to fish passage within coastal waters. If, after inspection, they find that fishways are insufficient (or nonexistent) and unsuitable for anadromous or migratory fish passage, then the Commissioners may require a fishway which is sufficient and suitable.

Specifically, the statutes allow the Commissioners to take action when:

1) Fish passage at the dam or obstruction in issue, whether alone or in conjunction with fish passage at other upriver barriers, will improve access to sufficient and suitable habitat anywhere in the watershed to support a substantial commercial or recreational fishery for one or more species of anadromous (or migratory in the case of the Commissioners of Inland Fisheries and Wildlife) fish; or

2) Fish passage at the dam or obstruction in issue is necessary to protect or enhance rare, threatened, or endangered fish species.

Furthermore, prior to construction of any new dams or obstructions, written notice must be given to the appropriate Commissioner. (12 M.R.S.A. §§ 6122, 7701-B) The notice must contain information regarding construction plans, proposed location, and date of construction. Within 30 days of receipt of this notice the Commissioner must "review the plans" and determine, using the above standards, whether a fishway is required.

Example

Two small fishways, within the jurisdiction of the Department of Marine Resources, are operated for passage and minimum flow maintenance. Stream areas below these fisheries (located on Gardner Lake outlet on Chase Mills Stream of the East Machias River and on Pitcher Pond outlet on Kendall Brook of the Ducktrap River) "are important production areas for sea run Atlantic salmon. During natural low [water] flow periods, the fishways provide for minimum [water] flows in [the] downstream production areas." (Flagg 1984b). The dams upon which these fishways are built, however, are not used for power purposes but only to maintain the lake and pond levels for the surrounding cottage owners.

Evaluation

The authority to require fishways in coastal and inland waters is within the respective discretion of the Commissioners of Marine Resources and Inland Fisheries and Wildlife. In coastal waters, only those flows may be protected that historically were or presently are frequented by anadromous fish. The Commissioner of Marine Resources can require fishways in all such coastal waters. In fact, fish passage is required on almost all coastal waterway dams. Similarly, the Commissioner of Inland Fisheries and Wildlife can require fishways for anadromous or migratory fish. Although both statutes provide for periodic inspection of all dams and obstruction, "periodic" is not defined in the statute. Both statutes were revised in 1983, but no internal definition of the term "periodic" has been established. It is conceivable that notification by a member of the public to the proper Commissioner that a dam or obstruction did not conform with the intent and purpose of the statute would instigate an inspection of the said dam or obstruction.

It should be noted that maintenance of instream values, in creating fishways, is a coincidental effect, the main purpose being to allow passage of fish. Often "when fishways are required, the flow of water through the fishway may not be of sufficient magnitude to protect downstream aquatic resources ..." (Flagg 1984b). Therefore, regulations of both agencies should be amended to insist that adequate instream flows accompany fish ladders so that downstream resources can be maintained.

SOURCES

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_______. Personal communication. Director, Anadromous Fish Division, Department of Marine Resources, Augusta, ME. 4 May 1984.

_______. Personal communication. Director, Anadromous Fish Division, Department of Marine Resources, Augusta, ME. Letter to Berton L. Lamb. 10 August 1984.

Parkin, D. Personal communication. U.S. Department of the Interior, National Park Service. Letter to Berton L. Lamb. 19 June 1984.

PROTECTION OF ENDANGERED SPECIES

Opportunity

The Commissioner of Inland Fisheries and Wildlife (IFW) could require adequate instream flow, or acquire land or aquatic habitats where necessary, for recovery of endangered species populations (12 M.R.S.A. § 7751 *et seq*.).

Background

In 1979, the Maine Legislature declared by statute that it was the policy of the State "to conserve, by according such protection as is necessary to maintain and enhance their numbers, all species of fish or wildlife found in the State, as well as the ecosystems upon which they depend." (12 M.R.S.A. § 7751.)

A fish or wildlife species must be designated by the Commissioner of IFW as endangered if one of the following conditions exists regarding that species:

1) The present or threatened destruction, modification or curtailment of its habitat or range;

2) Overutilization for commercial, sporting, scientific, educational or other purposes;

3) Disease or predation;

4) Inadequacy of existing regulatory mechanisms; or

5) Other natural or manmade factors affecting its continued existence within the State. (12 M.R.S.A. § 7753)

The above findings will be made based upon information usually gained through investigations. (12 M.R.S.A. § 7752)

Evaluation

Under this statute any threatened species of fish or wildlife can be protected. As noted above, the statute encompasses protection of the endangered species habitat. Therefore, if any endangered fish or wildlife species is put at risk because of decreases in water flow in a stream or river, the Commissioner of Inland Fisheries and Wildlife can institute a voluntary conservation program with adjacent landowners/water right owners. The Commissioner may, alternatively, buy land, aquatic habitat or rights therein in order to protect the endangered species. Once the land and/or water is acquired, the Commissioner can simply prohibit any uses thereon which endanger the designated species. The drawback to buying is, of course, the financial cost of land or water rights.

SPECIAL PURPOSE DISTRICTS AND PROGRAMS

PROTECTION PLANNING

Opportunity

Private landowners and government agencies may enter into protection plans or purchase land for the protection of rivers and streamflows. These methods can create more stringent standards for permissible activities on the land and water than those permitted by the LURC subdistricts (Milne 1978).

Background

Private parties and public entities often wish to permanently protect areas of land or water in order to maintain the areas' current attributes far into the future. There are several options available to such entities. A landowner, wishing to retain ownership of the land, may: 1) grant a long-term lease to a land management agency; 2) impose mutual covenants among several equally interested landowners; or 3) create a conservation easement which legally binds all present and future owners of the land. A long term lease would grant the leasing agency exclusive and unrestricted use of the land for the term of the lease. The lease must be recorded in the County Registry of Deeds.

A mutual covenant is an agreement among landowners containing restrictions pertaining to the use of the land. The document should be recorded in the County Registry of Deeds and is binding upon subsequent landowners. The permanence of this protection mechanism may be defeated, however, if a court applies the doctrine of changed conditions: a court may refuse to enforce the covenant in a situation where it believes that the benefits sought originally can no longer be achieved by continued imposition of the covenants.

The conservation easement is by far the most durable method of land protection. The landowner, while remaining the record owner of the land, grants an easement to an organization or agency whose duty it becomes to enforce the restrictions and purposes of the easement. Typical restrictions limit the number and location of structures, types of activities, what can be done to the surface, etc. The conservation easement is also recorded in the County Registry of Deeds and burdens the land thereafter. This method should be considered carefully before a decision is made. "The financial benefits [e.g., tax benefits] must be weighed against the realities of a loss in market value; the protection must be weighed against the need for flexibility" (Milne 1978:9).

Other options for the landowner willing to dispose of land are sale or donation of the land to private or public organizations. A sale involves direct monetary compensation while donation does not, although one might reserve the right for oneself or one's immediate family to use the land for their respective lifetimes when donating the land. Additionally, the deed which transfers the ownership of the land can contain additional restrictions or easements pertaining to the use of the land.

State agencies in Maine that are interested in acquiring the above-listed protections (with the exception of mutual covenants) include the Bureau of Parks and Recreation, Bureau of Public Lands, and the Department of Inland Fisheries and Wildlife. For information regarding private, nonprofit organizations interested in acquiring these interests, the Critical Areas Program, the Maine Coast Heritage Trust, The Nature Conservancy, and the Maine Association of Conservation Commissions (all advisory agencies) should be contacted.

Examples

The land use standards, as established by the LURC, are statutorily considered to be the minimum requirements (12 M.R.S.A. § 685-A.4). Therefore, "zoning" may be more restrictive, as in the case of the St. John River Resource Protection Plan where landowners along the St. John River wished to protect the river's natural values.

The Plan affected a 250-foot corridor on either side of a specified segment of the St. John River. Within this corridor only those uses expressly mentioned in the Plan are allowed. Standards in the Plan for the conduct of allowed activities and criteria for issuing activity permits are stringent. Most activities require a conference with a biologist from the Department of Inland Fisheries and Wildlife, and in order for the proposed activity to be approved, the landowner and biologist must agree on the manner in which the activity is to occur.

An example of a conservation easement can be found on the Penobscot River. The Great Northern Nekoosa Corporation (a paper company), faced with growing public concern to protect the river and with its own need for hydropower, granted to the State of Maine a conservation easement covering 9,000 acres along the Penobscot. "The easement prohibits commercial, residential, and hydropower development on specified stretches and provides for recreational use of the river corridor for camping, fishing, and boating under the management of Maine's Bureau of Parks and Recreation." (Maine Coast Heritage Trust, 1984).

Evaluation

As indicated by the examples, protection planning is a very effective method of protecting land and water. As a consequence, instream values are also protected. The programs and devices are entirely voluntary and the landowner must make his decisions carefully. Because of its legally binding durability, the conservation easement has the greatest potential for protection of instream values in situations where the landowner wishes to retain ownership. In situations of sale or donation, landowners can place restrictions in the deed which mandate protection of instream values.

SOURCES

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FORMATION OF SOIL AND WATER CONSERVATION DISTRICTS

Opportunity

A soil and water conservation district can protect instream flows by implementing measures for conservation of water within the district. (12 M.R.S.A. § 2 *et seq*.)

Background

The purpose of the Soil and Water Conservation District law can be discovered in the legislative declaration of policy.

> It is declared to be the policy of the Legislature to provide for the conservation of the soil and water resources of this State, and for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife...(emphasis added) (12 M.R.S.A. § 2).

A Soil and Water Conservation District is petitioned into existence by 25 occupants of land lying within the proposed district. (12 M.R.S.A. § 151). The powers of these districts include the building and managing of improvements in the conservation, development, utilization and disposal of water within the district on lands owned or controlled by the State of Maine or its agencies or on any other lands within the district where consent of the occupier has been obtained.

There are 16 Soil and Water Conservation Districts in Maine. The districts have been divided primarily along county lines. Each district is run by five supervisors, three are elected by co-operating landowners within the district, two are appointed by the Maine Soil and Water Conservation Commission; all serve without pay. The supervisors of each district determine the needs and priorities of their respective districts, so that the proper action can be taken to control their district's soil and water problems. Any co-operating landowner within a district having soil or water problems (e.g., watershed planning, animal waste management, erosion control, etc.) may contact the Commission and receive technical services for planning from a Federal District Conservationist free of charge.

Evaluation

These districts could serve as effective protectors of instream flow as it is within their power to establish measures for conservation of water. Their authority is, however, limited to State owned or controlled lands and lands where the occupant has consented to their authority. Moreover, these districts are expressly forbidden to infringe or impair rights of any riparian landowner.

SOURCES

Beers, P. A. Personal communication. State Soil Scientist, Maine Soil and Water Conservation Commission, Augusta, ME. 25 October 1984.

CONDEMNATION BY WATER COMPANIES

Opportunity

A water company can condemn water above its point of use, effectively protecting instream flows in waterways as it transports the water to a downstream diversion. (12 M.R.S.A. § 3241)

Background

Water companies in Maine "may exercise the right of eminent domain law obtaining sources of supply and locations for storage and for the protecton thereof and locations for transmission and distribution of water to the public ..." (12 M.R.S.A. § 3241) Judicial interpretation has facilitated inclusion of protection of instream values in this statutory section. In Bowden v. York Shore Water Co. [114 ME. 150, 95 A. 779 (1915)], the court stated that protection of the purity and conservation of the quantity of a public water supply is a public use for which eminent domain may be exercised.

Evaluation

Condemnation takes property (water and/or land) out of private control and requires that the water company compensate the owner for any land or water taken at fair market value. This opportunity is seldom used because of the expense involved. Condemnation, nevertheless, remains a potent tool for instream flow protection and under certain conditions may be effectively used.

MUNICIPAL ACQUISITION

MUNICIPAL FORESTS

Opportunity

Municipalities may purchase land in order to preserve their water supply. They may also promulgate and enforce regulations preventing any uses which would interfere with instream flows. (12 M.R.S.A. § 3753 *et seq.*)

Background

Maine statutes provide that "[a] town ... or city ... may determine to purchase lands which shall be known as the town or city forest .... Such forest shall be devoted to the culture of forest trees *or to the preservation of the water supply of such* city or town." (emphasis added) (12 M.R.S.A. § 3752) A forester is appointed, who may make and enforce regulations that are necessary for proper care and maintenance of such lands. (12 M.R.S.A. § 3753) Therefore, if a city or town acquires land as a forest for the purpose of preserving its water supply (a river or stream, for present purposes), it may regulate activities on that land to prevent interference with instream flows.

Evaluation

Although this statute is primarily for creation and acquisition of a municipal forest, it expressly allows for acquisition of land for the purpose of protecting a municipal water supply. However, before any land is acquired under this statutory provision, the proposal to acquire must be approved by 2/3 vote at a town meeting, or in the case of a city, a 2/3 vote of the city government. Additionally, land must be acquired, i.e., brought under this statute, and cannot be taken by eminent domain.

MUNICIPAL OPEN AREAS

Opportunity

A municipality may acquire or condemn land for the purpose of creating open areas, which could conserve and protect instream values. (12 M.R.S.A. § 3851 *et seq.*)

Background

A municipality in Maine may establish conservation commissions. (12 M.R.S.A. § 3851) A conservation commission indexes all publicly and privately owned open areas within the municipality. An open area includes, among other things, "any space or area the preservation or restriction of use of which would maintain or enhance the conservation of natural resources, protect natural streams or water supplies, promote conservation of swamps, wetlands, beaches or tidal marshes ... [and] affect or enhance public recreation opportunities ..."

Open areas or easements on such open areas may be acquired by the Conservation Commission for the purpose of better utilizing, protecting, or developing such areas (with approval of the municipal legislative body). Additionally, a municipality can be petitioned "by at least thirty of its taxpaying citizens ... to take suitable lands for public purposes ... [e.g.] open areas ..." (12 M.R.S.A. § 4001) "To take" meaning acquisition of land through eminent domain, i.e., condemnation.

Evaluation

This statutory provision offers an excellent opportunity for municipalities to protect instream values inasmuch as the definition of "open area" expressly provides for protection of natural streams. It should not be forgotten that this section applies only within the municipal boundaries. Moreover, creation of open areas through acquisition is within the discretion of the legislative body, which cannot be forced into action. Also, creation of open areas will require funds, as both acquisition and condemnation require that compensation be paid to the owner.

RIVER CORRIDOR COMMISSIONS

Opportunity

Adjacent municipalities occupying shoreland can form river corridor commissions whereby they could cooperatively manage the river corridors to protect instream values. (30 M.R.S.A. § 1961 *et seq*.)

Background

In 1983, the Maine Legislature provided municipalities with the opportunity to form "river corridor commissions". These must include two or more adjacent municipalities occupying "enough of the shoreland on a river segment to be effective in managing the shorelands of the river ..." (30 M.R.S.A. § 1963.1.) The municipalities may then apply to the Commissioner of Conservation for commission status. They then create a comprehensive plan and can cooperatively zone their river corridor.

Evaluation

This statute provides an excellent opportunity for municipalities to protect rivers and their attendant instream values. Together the municipalities could zone shore property into protective zones (discussed previously in the zoning section) as well as cooperatively identifying open areas (discussed below). Thus, a true "greenbelt" could be achieved.

SOURCES

Parkin, D. Personal communication. U.S. Department of the Interior, National Park Service. Letter to Berton L. Lamb. 19 June 1984.

MANAGEMENT UNDER THE PUBLIC TRUST DOCTRINE

OPPORTUNITY

Each State owns certain property which it holds in trust for public uses. It holds this property not as a proprietor, free to sell or exchange it at will, but as a government, which must consider and benefit the entire public in any transaction involving this public trust property. The responsibility of the State as trustee is at the heart of the public trust doctrine. Under this doctrine, sale or grant of this trust property to private people can be examined very carefully by the courts, which have the authority to invalidate such sales or grants if the rights of the public have been slighted.

BACKGROUND

In the United States, the public trust doctrine has been applied to certain lands, waters, and wildlife. The doctrine requires each State to regulate and control public trust property within its borders in a manner consistent with the public interest. Moreover, the doctrine creates a legal right in the general public of each State, who may seek enforcement of the doctrine through the courts should the trust be violated.

There are several ideas arising out of case law dealing with public trust property which lend support to the public trust doctrine: 1) certain interests or resources are so important to every citizen that free access is imperative; 2) some resources are so particularly the gift of nature that they should be preserved for use of the entire population; and 3) certain uses have a particularly public nature which makes exclusively private use inappropriate (White 1983:86).

Certain types of lands are generally considered to be public trust lands. State courts, soon after the American Revolution enunciated the principle that land underlying navigable water was inalienable to private parties. For these lands, the Federal test of navigability is employed, which is a "navigability in fact" test: those rivers which _are used_ or _could be used_ as highways for commerce in the customary mode of trade and travel on water [_The Daniel Ball_, 77 V.S. 557 (1871)]. However, it should be noted that today the power to alienate public trust lands and the effect of alienation of such lands is governed by the laws of the various States. In the courts, four basic limitations have been placed on the power of a State to dispose of public trust property:

1) In construing grants by a sovereign (the various States) to private persons, a court will observe a presumption against the separation from the soverign power of title or dominion to navigable waters and the lands beneath;

2) Grants by a State to private ownership remain subject to the paramount Federal commerce power;

3) Grants of submerged lands must not interfere either with valid public uses or with valid private riparian rights; and

4) The State must maintain its soverign control over enough of the trust lands so as to protect all public interests; the State may relinquish control over a portion only when such real location does not jeopardize the public interest in the remaining trust property (Althaus 1978:403).

The leading case, often called the lode star case of the public trust doctrine, is a United State Supreme Court Case: Illinois Central Railroad Company v. Illinois, [146 U.S. 387 (1892)]. The case arose after the Illinois legislature, in 1873, repealed their 1869 "fee simple" grant to the Illinois Central Railroad of the entire Chicago waterfront (about 1,000 acres of submerged land). Although the Supreme Court did not prohibit the disposition of public trust lands to private parties, it did hold that the State could not abdicate its trust over property in which all the people of the State had an interest, so as to leave the property entirely under private control. Hence, a State must at least retain regulatory power over this public trust property. The Court declared that the title, which a State holds, of public trust property is:

> ... different in character from that which the State holds in lands intended for sale. .... It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction of interferences of private parties [Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892)].

Under this case, when a State holds a resource that is available for free use of the general public, a court will be displeased with any governmental conduct that will either reallocate that resource to more restricted uses or subject public uses to the self-interest of private parties.

With regard to waters, generally, public trust waters are navigable waters; "navigable" waters equating with public waters and "nonnavigable" waters equating with private waters. The State must control its navigable (public trust) waters with rules and regulations. All privileges or uses granted in public waters are subject to State control. For determining which waters are "navigable" (for the purpose of imposing the public trust on waters) each State applies its own test of navigability. Some States have adopted statutory definitions of navigability (e.g., in Texas a nontidal stream is navigable if it retains an average width of 30 feet from its mouth up [Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 444 (1935)]). Other States use a floating log test, where water is navigable if it has the capacity to float logs to "market". Still others use a recreational or pleasure boat test, where waters are navigable if they are capable of use for boating (even pleasure boating). These definitions of navigability are the major ones used by States today.

Traditionally, three public uses have been recognized as protectable under the public trust doctrine (in "navigable" waters): navigation, commerce, and fishing. To these have been added activities "incident" to navigation, commerce, or fishing, e.g., recreational purposes, which do not impair traditional public uses. Additionally, in some instances, public rights of passage on and access to navigable waters have been upheld.

Generally, United States Courts have been willing to interfere in four types of situations for the purpose of upholding the public trust. These situations are: 1) where public property has been disposed of at less than a fair market price when nothing indicates an obvious reason for a subsidy; 2) when authority to make resource use decisions has been granted to a private interest which may subordinate public uses to the private interest; 3) where broadly based public uses have been reallocated to private uses or to narrow public uses; and 4) where the resource is not being used for its natural purposes (White 1983).

Protection of instream values by implementation of the public trust might take the form of injunctive relief, instigated by the public to maintain adequate streamflows for the public's use (boating, swimming, fishing). Or perhaps public agencies, on behalf of the public, might assert a right to protect and maintain adequate streamflows. Instream values might be further protected where streamflows are so low as to endanger fish or wildlife, which are also public trust resources. However, using the public trust doctrine requires lengthy litigation, as well as its resulting costs and risks; the advantage of this being that after succeeding in litigation, flows that have been judicially declared to be public trust waters are unlikely to be threatened by later uses.

The Public Trust Doctrine in Maine

In Maine, public rights of use exist in waters subject to tide ebb and flows, great ponds (bodies of water whose surface area is at least 10 acres), and navigable waterways. Generally, a navigable (public) waterway is one which has the ability to float a saw-log. Alternatively, if a waterway can float a pleasure craft, it is considered navigable.

Three principal public uses have been recognized by the Maine Courts as requiring protection under the public trust doctrine. These uses are: 1) navigation [Stanton v. Trustees of St. Joseph's College, 233 A.2d 718 (Me. 1967)]; 2) diversion for power purposes, i.e., a riparian owner may divert the water of a river for generating hydroelectric power as long as the diversion does not interfere with navigation, fish passage, and/or use by other riparian owners [Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919)]; and 3) fish passage [Central Maine Power Co. v. Public Utilities Comm'n., 156 Me. 295, (1960)].

Specifically, in navigable, nontidal waterways (not great ponds) the public right to operate vessels for commerical purposes has long been recognized (Waite 1973:165). Pleasure boating has been indicated as an acceptable public use of water. Although no Maine Court decision addresses itself to a public use right of swimming, fishing, water skiing, etc., one author has opined that the popularity of, and revenue produced by these activities would move a Maine Court to include them within public uses protectable under the public trust doctrine (Waite 1973:179).

Actual court decisions give rise to at least two occasions where injunctive relief may be granted for interference with a public use right: 1) where a private individual's actual use of public rights is thwarted; and 2) where public rights are infringed upon by actions which amount to a public nuisance (Waite 1973:172-176).

Furthermore, the Maine Supreme Court has enunciated its standard of review of any legislative action pursuant to public trust responsibilities:

> ... the Legislature's powers ... are subject to the threefold limitation that its enactments be 'reasonable,' be 'for the benefit of the people,' and not be repugnant to any other provision of either the Maine or United States Constitution. [Opinion of the Justices, 437 A.2d 597 (Me. 1981)].

Therefore, someone wishing to bring legal action against one believed to be interfering with public use of public trust waters, should base the suit on public nuisance. "For the private party to prevail in such a suit, special damages, different from those suffered by the public at large, must be shown." [Spickler 1980:14].[2] The Attorney General, in the case of public rights, should seek injunctive relief to protect them. Should he fail to do so, a citizen may go to court seeking a writ of mandamus, which would command the Attorney General to perform his official duty, in this case to seek protection of the public rights in public trust waters.

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[2] Damages are defined as outcomes "which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence" ... Black's Law Dictionary (5th ed., 1979).

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This publication is one of a series of similar documents for western and midwestern States that provides a survey of State prerogatives and programs that may be used to protect the instream uses of water. Most of the opportunities for protecting instream flows are related to fish and wildlife habitat, although many other instream uses are considered, including hydroelectric power production, recreation, navigation, downstream delivery, and waste load assimilation. These documents illustrate methods to protect instream uses within the context of existing laws and regulations.

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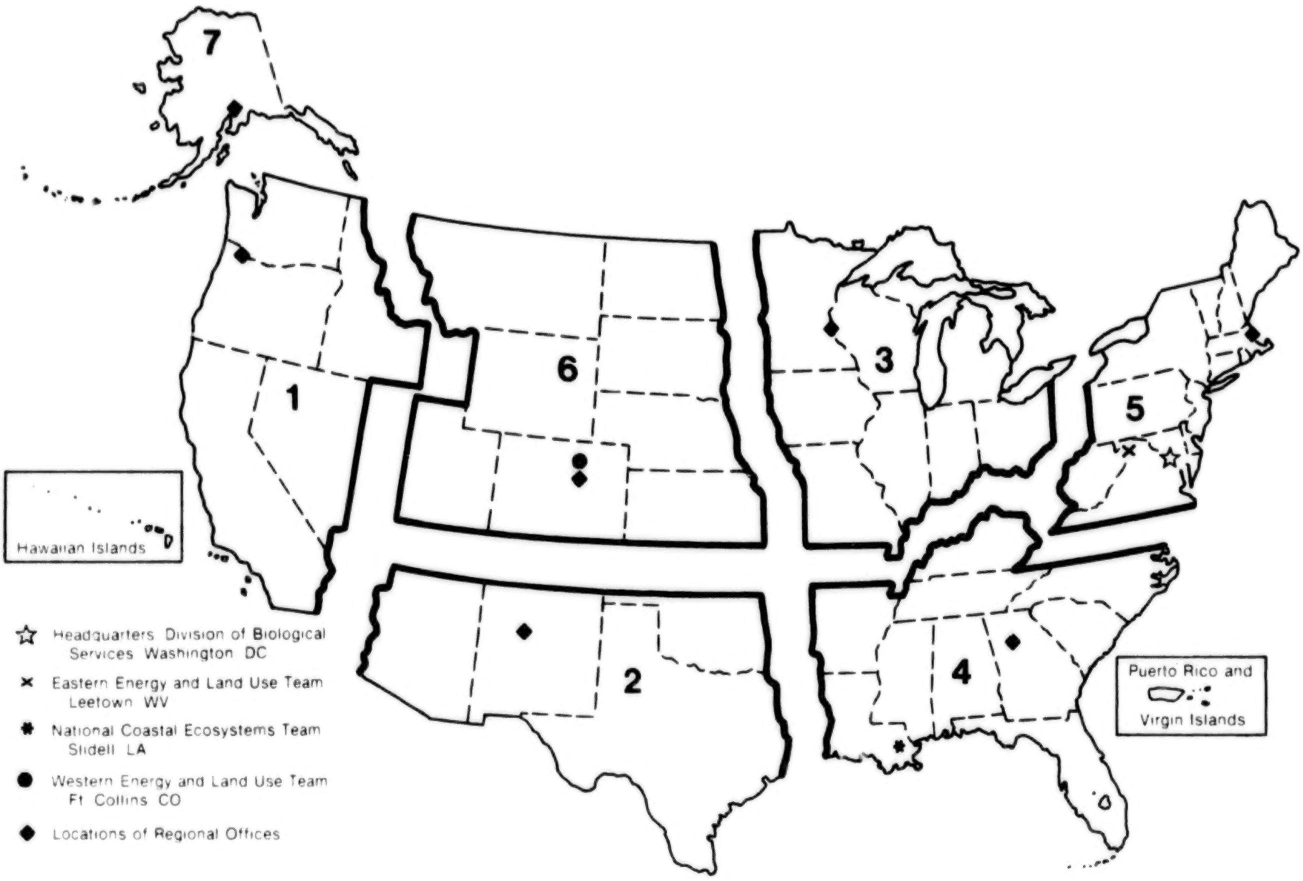
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